In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-827

CYRUS T. ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that he was deprived of his Sixth Amendment right to an impartial jury when the district court selected the jury from among a group willing to extend its service to hear a lengthy trial; (2) that the court improperly admitted evidence of another similar offense; and (3) that he was not given sufficient warning of the anticipated testimony of a government witness.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on three counts of bribing Daniel Brewster, a United States

Senator, in violation of 18 U.S.C. 201(b).[1] He was sentenced to consecutive terms of six to eighteen months' imprisonment and fined $10,000 on each count. The court of appeals affirmed and entered judgment on November 12, 1974 (Pet. App. 1a-42a). The petition for a writ of certiorari was filed on January 2, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event there is no reason to grant the writ.

The evidence, which is not here in dispute, is set forth in the opinion of the court of appeals. It showed "the execution of a scheme designed to route payments from Spiegel through Anderson to Brewster and to a nominal campaign committee" set up for Brewster (Pet. App. 4a), in order to influence Brewster's action on postal legislation. The principal evidence against petitioner came from John Sullivan (a former Brewster aide) and Betsey Shipley Norton (a close friend of petitioner).

1. Petitioner asserts that he was tried by a "volunteer" jury, and that this jury could not have represented a cross-section of the community. At a pre-trial conference on October 27, 1972, the trial judge told counsel that Monday, October 30, the date on which trial was set, also was the last day of normal jury service, and that because he would have to grant any request by a juror to be excused, he had caused the question to be asked in the Jury Lounge as to who would be willing to serve on a

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[1]Petitioner, a registered lobbyist, was tried jointly with former Senator Brewster and with Spiegel, Inc., petitioner's employer. Spiegel, Inc., pleaded guilty during the trial to two counts of giving an unlawful gratuity, in violation of 18 U.S.C. 201(f). Brewster was convicted on three counts of the lesser included offense of accepting illegal gratuities, in violation of 18 U.S.C. 201(g). The court of appeals reversed Brewster's conviction, 506 F.2d 62, on grounds not pertinent to this appeal. The government is preparing to retry Brewster.

case, which was not identified, that would take about two weeks to try. Sixty-eight of the potential jurors had replied affirmatively, and the balance of two or three hundred had declined. The judge then asked counsel if they objected to this procedure (App. 60). Mr. Bonner, petitioner's counsel, stated (*ibid.*):

> It occurs to me, Judge Hart, and it just occurs to me, I will abide by the majority vote of defense counsel, it might be best to start with a new jury on Tuesday.

Mr. O'Connell, another defense counsel, then asked if the 68 were "all volunteers and not employed" (App. 60-61). Mr. Bonner asked to discusss the matter with the other defense counsel before making a decision. The trial judge said that he intended to use the pool of 68 unless counsel made a claim that it would prejudice them, because otherwise he would have to ask the larger panel the same question individually, and would grant their requests to be excused (App. 61). Mr. Bonner responded (*ibid.*):

> I am not suggesting that, Judge Hart. I am suggesting to my brother defense counsel we might consider the new jury where we wouldn't have that problem. I don't know whether they would prefer the old jury.

Defense counsel had ample opportunity to consider the jury question and to object, either then or on the first day of trial, three days later. They did neither. We submit that petitioner cannot now object to the composition of the jury panel when he failed to do so at trial.[2]

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[2]This is, therefore, an inappropriate case in which to reconsider *Frazier* v. *United States*, 335 U.S. 497, which supports the result reached below.

In any event, petitioner's claim that this procedure denied an impartial jury was correctly answered by the court below, on whose opinion we rely (Pet. App. 15a-17a):

> To be sure, Anderson was entitled to a trial by a jury selected from a body truly representative of the community. However, his characterization of the composition of the jury panel utilized in this case is far from accurate. There is not the slightest hint that the October complement of jurors—from which came the 60-member panel, and ultimately the jury for his trial—was other than a fair cross-section of residents of the District of Columbia. Neither the panel nor the trial jury became any the less so by reason of the technique the judge employed. To say, as Anderson does, that the trial jurors had no responsibilities in competition with jury service is to indulge in speculation in an area wherein proof is an indispensable prerequisite. Moreover, jury service in this age involves almost inevitably some sacrifice of personal pursuits; without people willing to devote some of their time and energy, the jury system would grind to a halt. The traditional response of the populace to the call to this public duty belies the notion that those who respond have nothing else of importance to do.
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> Nor, by our understanding, was the trial judge's methodology in this case an appeal to the outgoing body of jurors for volunteers. The effort, rather, was to avoid imposition of an unexpected burden upon jurors who could ill afford to continue beyond the period for which they had been summoned to serve. Certainly the judge would have been justified in excluding any of those in the 200-odd category who might

> individually have shown undue hardship, even during the term of regular service. Here the endeavor was to eliminate the tedious process of examining one by one the obviously large group who would seek to be excused for that reason.
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> In separating those who could from those who could not afford to expand their service, the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality. We think a trial judge's discretion in jury selection is broad enough to encompass consideration of adverse consequences which might be suffered by jurors suddenly called to a duty prolonged materially beyond their original expectations. [Footnotes omitted.]

2. Government witness Sullivan testifed that in late 1965 a particular fund raiser had suggested petitioner as a source of funds for the approaching political campaign of Senator Brewster. When the fund raiser told Brewster that she would have petitioner call him, Brewster replied that she should have him call Sullivan instead. When, after the fund raiser's departure, Sullivan asked Brewster why he did that, Brewster replied: "I know Cy Anderson and back when I was a Congressman he tried to bribe me and I threw him out of my office" (App. 128). In response to an objection on behalf of Spiegel the court instructed the jury (App. 129):

> Ladies and gentlemen of the jury, that particular statement is admitted only as it relates to Senator Brewster and not as it relates to Spiegel or Anderson.

Spiegel moved for a mistrial, which was denied (App. 129). No objection or motion of any kind was made by petitioner's counsel.

In any event, petitioner's contention that this testimony was impermissibly considered against him was answered by the court below (Pet. App. 31a-32a):

> The statement in question tended to show Brewster's prior knowledge of Anderson and Brewster's state of mind in accepting money from Anderson. So, upon a balance of that value against possible injury, the trial judge might properly have admitted that statement for the jury's consideration in connection with the bribery charges then pending against Brewster.
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> The greater concern, however, is not the admissibility of the statement against Brewster, but the effect of such admission upon Anderson, and in that regard Anderson lodges three complaints. One is that the statement, as to Anderson, was hearsay, and with that premise we readily agree. But the statement, as a purported admission by Brewster, was not hearsay as to him, and the trial judge instructed the jury to confine to Brewster alone any use it might make of the statement. Another complaint registered by Anderson is that since, at the time of admission of the statement, Brewster could not have been examined by Anderson, he was deprived of his constitutional right of confrontation. That difficulty disappeared, however, when later in the trial Brewster took the witness stand himself and denied that he ever made the statement. Anderson's remaining complaint is that the trial judge's limiting instruction did not give him adequate protection. We think the jury's willingness to heed instructions and its ability to keep separate the evidence against Brewster and Anderson, respectively, is amply shown by the discriminating verdicts it rendered. [Footnotes omitted.]

We add that once Brewster took the stand, dissipating any confrontation clause problem, the hearsay testimony became fully admissible against petitioner as well. The government was required to demonstrate petitioner's specific intent to influence Brewster, and Brewster's alleged statement, if it occurred, was highly probative on the question of Anderson's knowledge and intent. Petitioner had ample opportunity to cross-examine Sullivan and Brewster and thereby shed light on whether Brewster made the statement implicating petitioner.

3. Finally, petitioner contends that he was deprived of a fair trial because knowledge of the "devastating" testimony by the witness Betsey Norton was communicated to him only shortly before trial. The opinion of the court of appeals summarized the salient facts surrounding Norton's testimony. Prior to trial there had been a series of discussions, in lieu of pre-trial discovery, which had been summarized in a jointly prepared "memorandum of conferences" (App. 41-51). This memorandum stated that the testimony of Norton would be relatively insignificant. On the Saturday before the Monday trial, however, the prosecutor learned that Norton possessed knowledge far more extensive than previously believed. He informed defense counsel of this on Sunday. The trial court found that the government had acted in good faith in forwarding this information to the defense as soon as practicable and pointed out that in any event Fed. R. Crim. P. 16 does not compel the government to make such information available to the defense.

A full week elapsed after this disclosure before Norton took the stand. After she testified, several witnesses, including petitioner himself, testified in contradiction to her version of events. Petitioner was not harmed by the ruling denying him a continuance (Pet. App. 18a-23a). As the court of appeals put it (Pet. App. 22a-23a):

> A whole week passed between the prosecutor's disclosure of Ms. Norton's newly-found knowledge to defense counsel and the time at which she took the witness stand. Just why that did not afford the opportunity Anderson's counsel asked for is not explained. Indeed, defense witnesses, including Anderson himself, testified in explicit detail in the effort to contradict Ms. Norton's description of disputed events and, more fundamentally, to destroy her basic credibility before the jury. In sum, the able and vigorous defense Anderson's counsel erected against Ms. Norton's "new" testimony belies any thought that Anderson was in any way harmed by the trial judge's ruling. [Footnote omitted.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.